

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>EDWIN O. HORN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,878
<b>CITY OF TOPEKA</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent, self-insured, appealed Administrative Law Judge (ALJ) Brad E. Avery's Award dated March 14, 2001. The Appeals Board (Board) heard oral argument on September 4, 2001.

**APPEARANCES**

John J. Bryan of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board considered the record and adopts the stipulations listed in the Award.

**ISSUES**

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical benefits?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This case involves a May 5, 1995 accident and injury. Claimant, a long-term employee of respondent, had an extensive history of prior low back problems. In 1989, claimant underwent a laminectomy at L4-5 for a herniated nucleus pulposus. In 1991, after continuing complaints of low back pain and symptomatology, another physician fused claimant's spine at the L4-5 level.

Claimant described the results of the second surgery as "good." Claimant said his back pain and problems resolved, that he worked thereafter without medical restrictions, and that he "could do about anything" he wanted to do after the second surgery.<sup>1</sup> He specifically testified that during the six months before the May 5, 1995 accident, he no longer suffered from chronic, ongoing back pain or numbness, or pain radiating into his lower extremities, nor did his condition require him to take pain medication on a daily basis.

But on May 5, 1995, claimant re-injured his back when he lifted the metal lid off a meter box. As a result, additional medical treatment was required. A surgeon removed the hardware from claimant's back and performed a two-level decompression at L3 through L5 with additional instrument fixation and fusion.

After the operation, claimant returned to work for respondent in an accommodated position earning at least 90 percent of his pre-injury average weekly wage. At the Regular Hearing, he described his pain and problems after the May 5, 1995 accident as continuous low back pain, pain down the right and left legs, and tingling in his right foot. He further testified that after his third surgery he could not twist or bend at the waist, and his condition required daily medication.

Three physicians testified regarding claimant's current functional impairment under the third edition, revised, of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides), as well as the percentage of claimant's preexisting functional impairment. At respondent's request, Dr. Phillip Baker, who is board certified in orthopedic surgery, examined claimant on October 8, 1998. Dr. Baker's written report reflected an 18 percent rating for lower extremity pain and reduced strength (7 percent whole body) and a 0 percent rating for lost range of motion. The report also reflected a rating for "spinal stenosis, segmental instability, or spondylolisthesis, operated" based on

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<sup>1</sup> Tr. of Reg. H., at 6, 8-9 (Dec. 8, 2000).

Table 53, page 80 of the Guides. This rating included 12 percent attributable to “single level operation with residual signs of symptoms,” 2 percent added for “multiple levels operated, with residual, medically documented pain and rigidity with or without muscle spasm,” 2 percent added for a second operation “with residual, medically documented pain and rigidity with or without muscle spasm,” and 1 percent added for third operation “with residual, medically documented pain and rigidity with or without muscle spasm.”<sup>2</sup> According to Dr. Baker’s report, only 1 percent of the entire 23 percent whole body impairment rating was attributable to the May 5, 1995 accident and resulting surgery.

Dr. Baker initially refused to assign a rating for lost range of motion because he believed the 23 percent rating represented the extent of claimant’s impairment, and he initially believed claimant’s range of motion measurements were invalid.<sup>3</sup> He admitted at his deposition, however, that the measurements were arguably valid, and therefore, claimant should be entitled to an additional 13 percent rating for lost range of motion under the Guides.

Dr. Daniel Zimmerman, an internist and certified independent medical examiner, testified on behalf of claimant after examining claimant on October 12, 1999. In his written report, he rated claimant as suffering from a 30 percent permanent partial impairment of function, 12 percent of which preexisted the May 5, 1995 accident. Similar to Dr. Baker’s opinion regarding preexisting impairment, Dr. Zimmerman attributed 10 percent to claimant’s first operative procedure and 2 percent to the second operative procedure. Dr. Zimmerman attributed claimant’s 11 percent rating for lost range of motion to the May 5, 1995 accident. He further opined that claimant’s 6 percent (whole body) rating for lower extremity weakness and 1 percent (whole body) rating for radicular pain were both causally related to the May 5, 1995 accident. According to Dr. Zimmerman’s deposition testimony, claimant actually suffered from a 19 percent whole body impairment as the result of the May 5, 1995 accident according to the Combined Values Chart in the Guides.

Finally, the court-ordered independent medical examiner, Dr. Peter V. Bieri, evaluated claimant on February 28, 2000. In his written report, he too cited “page 8, Table 53, IV, C and D, 1 and 2,”<sup>4</sup> as the basis for a 16 percent whole body impairment rating for residuals of spinal surgery. He further cited to page 98 of the Guides as the basis for a 13 percent whole body impairment rating for range of motion deficits and page 77 as the basis for a 4 percent (whole body) impairment rating for lower extremity impairment resulting from radiculopathy. Similar to Dr. Zimmerman, Dr. Bieri thus assigned a 30 percent

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<sup>2</sup> Phillip L. Baker, M.D., Depo., Ex. 1 (Dec. 5, 2000).

<sup>3</sup> Phillip L. Baker, M.D., Depo., at 14, 25 (Dec. 5, 2000).

<sup>4</sup> Peter V. Bieri, M.D., Depo., Ex. 2 (July 20, 2000).

combined value whole body impairment, 14 percent of which was attributable to a preexisting lumbar fusion after two operations, with minimal residual symptomatology according to page 80 of the Guides.

The ALJ adopted the opinion of the independent medical examiner, Dr. Bieri, and found that claimant suffers from a 30 percent functional impairment. He further found respondent sustained its burden of proving that 14 percent of claimant's functional impairment was attributable to his preexisting condition.

On appeal, respondent argues that the Board must reverse the ALJ's decision because Dr. Bieri's opinion is not credible under the Guides. Claimant, on the other hand, argues that respondent is not entitled to an offset for preexisting impairment under K.S.A. 44-501(c) because the record does not contain an opinion regarding preexisting impairment that predated the May 5, 1995 accident and which was based upon the same edition of the Guides applicable to claimant's date of accident in this case.

While the Board understands and appreciates the various medical opinions' shortcomings, the Board is persuaded that Dr. Bieri's medical opinion accurately represents claimant's pre and post-injury functional impairment. Despite conflicting evidence regarding radicular symptoms and lost range of motion prior to the current date of accident, the preponderance of the evidence supports a finding that before the May 5, 1995 accident, claimant worked without medical restrictions and was able to perform his regular job duties without difficulty or the use of pain medication. Dr. Bieri's opinion took this history into consideration. Dr. Bieri's opinion in this regard is consistent with the preponderance of the evidence.

Dr. Baker's opinion assumed claimant did suffer from preexisting impairment based on radiculopathy and lost range of motion. He in essence stated that it was medically reasonable for him to evaluate such factors based on his experience regarding the results a person generally obtains after undergoing lumbar surgery. But Dr. Baker's reasoning is not only inconsistent with Dr. Bieri's opinion and Dr. Zimmerman's opinion that objective medical evidence conforming with the Guides' assessment requirements is absolutely necessary to evaluate preexisting impairment under the revised third edition of the Guides, it is also inconsistent with the plain and unambiguous language in the Guides reflecting that the strength of the medical support for a disability determination is dependent on the completeness and reliability of the medical documentation in the patient's file.<sup>5</sup>

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<sup>5</sup> See Guides to the Evaluation of Permanent Impairment at 6 (American Medical Association 3d ed. rev.1990); Cf Everly v. Dillon Companies, Inc., Docket No. 223,739, 1999 WL 557562 (Kan. WCAB June 29, 1999).

All three physicians based their opinions regarding preexisting impairment in whole or in part on the rating designated by the Guides for the residuals of multiple lumbar surgeries.<sup>6</sup> To that extent, the Board finds useful all the various medical opinions. The differences between the various opinions appear to be based on the physicians' evaluations of claimant's statements and medical records regarding residual signs and symptoms after the first and second surgeries. The ALJ accepted claimant's testimony regarding the residuals of his first and second surgery. The Board likewise finds claimant's testimony concerning his pre-injury and post-injury symptomatology to be credible. Accordingly, the Board agrees with the ALJ's adoption of Dr. Bieri's medical opinion regarding preexisting impairment. Therefore, the Board affirms the ALJ's finding that claimant suffers from a 30 percent functional impairment rating, 14 percent of which preexisted claimant's May 5, 1995 date of accident.

Claimant may seek future medical benefits for the May 5, 1995 injury upon proper application to and approval by the Director.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of the Administrative Law Judge Brad E. Avery dated May 5, 1995, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Matthew S. Crowley, Attorney for Respondent  
John J. Bryan, Attorney for Claimant  
Brad E. Avery, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>6</sup> Guides at Table 53 p.80.

**EDWIN O. HORN**

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